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Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine

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I. INTRODUCTION

The confusion generated by the doctrine of assumption of risk¹ is illustrated by the contradicting responses to the following hypothetical:

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¹ "The confusion . . . has been fueled, in part, by the failure of the courts and commentators to recognize a consistent usage of assumption of risk." Spell, *Stemming the Tide of Expanding Liability: The Coexistence of Comparative Negligence and Assumption of Risk*, 8 MISS. L. REV. 159, 162 (1988). In *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 68 (1943), Mr. Justice Frankfurter noted in a concurring opinion: "[T]he phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishing it as a legal formula, indiscriminatingly used to express different and sometimes contradictory ideas." Further, assumption of risk "has generated so many elusive distinctions that precedent is often of little help." *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 539 (Tex. 1975).

Because of this confusion, some commentators urge abolishment of the doctrine. See, e.g., Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961). "The expression, assumption of risk, is a very confusing one. In application it conceals many policy issues, and it is constantly being used to beg the real question. Accurate analysis in the law of negligence would probably be advanced if the term were eradicated and the cases divided under the topics of consent, lack of duty, and contributory negligence." *Id.* Cf. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) § 68, at 480 [hereinafter W. KEETON & D. DOBBS].

To add to the confusion, courts and commentators use different systems to subcategorize the various cases invoking assumption of risk. It has been divided into anywhere from two to six categories. See Rosenlund & Killion, *Once a Wicked Sister: The Continuing Role of Assumption of Risk Under Comparative Fault in California*, 20 U.S.F. L. REV. 225, 231 (1986).

An apartment complex hires an expert to repair an elevated installed air-conditioning unit. The expert acknowledges that the ladder attached to the building is poorly located, but, after an arguably reasonable evaluation of the situation, proceeds anyway. The expert is injured in a fall attributable in part to the negligently installed ladder.²

Should the repair expert obtain full, partial, or no recovery against the apartment complex? All three answers currently exist in American tort law.³

Assuming the defendant is negligent, two defenses were traditionally available: contributory negligence and assumption of risk. Historically, either constituted a complete defense. Contributory negligence exists when the plaintiff's own negligence is a proximate cause of his or her own injury.⁴ Assumption of risk is a plaintiff's voluntary and knowing exposure to a particular risk.⁵

² This hypothetical is similar to the facts of *King v. Magnolia Homeowners Ass'n*, 205 Cal. App. 3d 1312, 253 Cal. Rptr. 140 (1988). The court in *King* held that the plaintiff was barred from recovering his damages because he had reasonably assumed the risk of a fall. *Id.* at 1316, 253 Cal. Rptr. at 143. For a limited duty approach to the problem, see *infra* note 73.

³ See *infra* notes 9, 10, 13 & 107 and accompanying text. The possible use of partial recovery for *reasonable* assumption of risk is discussed *infra* at note 107 and accompanying text.

⁴ *The Restatement (Second) of Torts* offers the following definition of contributory negligence: "[C]onduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." RESTATEMENT (SECOND) OF TORTS § 463 (1965). See W. KEETON & D. DOBBS, *supra* note 1, at 451 for a similar definition.

An early case illustrating contributory negligence is *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (1809). Most commentators name *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824), as the first American case on the subject. See, e.g., W. KEETON & D. DOBBS, *supra* note 1, at 451.

⁵ *The Restatement (Second) of Torts* defines assumption of risk as follows: "[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk." RESTATEMENT (SECOND) OF TORTS, *supra* note 4, at § 496C. The elements of the defense of assumption of risk are: "the plaintiff must know that the risk is present, and he must further understand its nature; and . . . his choice to incur it must be free and voluntary." W. KEETON & D. DOBBS, *supra* note 1, at 487.

Assumption of risk was developed from the common law action of a servant against his master. See, e.g., *Meistrich v. Casino Area Attractions*, 31 N.J. 44, 48, 155 A.2d

Today, in a majority of American states, comparative negligence has replaced contributory negligence.⁶ In these states a plaintiff's negligence results in a partial deduction from recovery rather than a complete bar. The amount deducted depends upon the relative culpability of the defendant and

90, 93 (N.J. 1959). The master owed a duty only to keep a reasonably safe work place. Providing he discharged that duty, he was not liable for a servant's injuries due to inherent dangers in the work place because he had not breached his duty and thus was not negligent. *Id.* The purpose of this doctrine was used to insulate nineteenth-century capitalists from the human overhead of their developing industries. Rosenlund & Killion, *supra* note 1, at 226. The doctrine eventually evolved into an affirmative defense for which the defendant bore the burden of pleading and proof. *Blackburn v. Dorta*, 348 So. 2d 287, 290 (Fla. 1977). If the servant voluntarily exposed himself to a risk negligently created by the master, the servant was barred from recovering from the master. *Id.*

In *Halepeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 n.3 (Tex. 1963), Justice Greenhill describes the American Law Institute's debates over the adoption of assumption of risk in the *Restatement (Second) of Torts*.

Prior to the adoption of comparative negligence there was little need to distinguish between contributory negligence and assumption of risk because in either case the plaintiff was completely barred from recovery. Now, particularly in light of the confusion in the application of assumption of risk, *see supra* note 1, and the widespread adoption of comparative negligence, it is important to clarify the distinction. "The theoretical distinction between the two is clear: secondary assumption of risk rests upon the plaintiff's voluntary consent to take his chances, while contributory negligence rests upon plaintiff's failure to exercise the care of a reasonable man for his own protection." Note, *Comparative Negligence and Assumption of Risk—The Case for Their Merger*, 56 MINN. L. REV. 47, 51 (1971). *See also* Rosenlund & Killion, *supra* note 1, at 231; Spell, *supra* note 1, at 167.

⁶ *Prosser and Keeton on the Law of Torts* describes comparative negligence as follows: "[A] plaintiff's contributory negligence does not operate to bar his recovery altogether, but does serve to reduce his damages in proportion to his fault. The system in this form is designed to compensate an injured party for all of the harm attributable to the wrongdoing of the defendant." W. KEETON & D. DOBBS, *supra* note 1, at 472.

plaintiff.⁷ Should assumption of risk also be subjected to the apportionment principles of comparative negligence?

⁷ For an excellent survey of the development of comparative negligence in America, see WOODS, *COMPARATIVE FAULT* § 1:11 (2d ed. 1987). Only five states have retained the complete bar of contributory negligence: Alabama, Maryland, North Carolina, South Carolina, and Virginia. All other states have followed the lead of Mississippi in 1910 and adopted some form of comparative negligence.

Three forms of comparative negligence are currently applied. The pure form, adopted by 13 states (including California, Florida, and Rhode Island), permits recovery from a negligent defendant in proportion to the extent of defendant's negligence, regardless of the extent of the plaintiff's own negligence. The modified form apportions recovery similarly, but will bar recovery where the plaintiff is at least as negligent as the defendant (in 9 states) or more negligent than the defendant (in 20 states). Nebraska, South Dakota, and Tennessee apply the third form, which bars the plaintiff whose negligence is more than "slight" or "remote." *Id.* at 24-30.

The response of jurisdictions and commentators⁸ has been mixed. One position holds that assumption of risk in all its manifestations should remain a complete defense, even when contributory negligence is converted to a comparative system and remains only a partial defense.⁹ Another position abolishes the tort defense of implied assumption of risk.¹⁰ Under this

⁸ Several commentators have developed unique solutions to the assumption of risk puzzle. See generally Epstein, *Medical Malpractice: The Case for Contract* 1976 AM. B. FOUND. RES. J. 87 (In proposing a contract approach to one area of tort law, medical malpractice, the article points out that, when parties consent to enter a relationship, problems assume a contractual dimension. By squeezing these relationships into tort law solutions, we may place "too much pressure on a system of law that works best at keeping people apart . . . [rather than] bringing them together." *Id.* at 94.); Flemming, *Forward: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976) (advising against abolishing and for "casting assumption of risk into a narrower mold, more comfortable with its underlying rationale of consent and substantially restricting its ambit in accordance with contemporary values" *Id.* at 265.); Rosenlund & Killion, *supra* note 1, at 287 (concluding that "assumption of risk should continue as a separate and complete defense under California's comparative negligence system whenever the defendant is able to show the plaintiff voluntarily consented to encounter a known and reasonable risk at his own expense"); Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U.L. REV. 231 (1987) (In this model, reasonable implied assumption of risk would be a complete bar only where it represented a plaintiff's full preference for a risky activity over the same activity made less risky. *Id.* at 218–23. As an example, the author suggests that a plaintiff injured while hang gliding does not assume the risk because he can avoid the risk only by not hang gliding. *Id.* at 216–17. But, if hang gliding could be made safer by placing a cage around the glider and the plaintiff chose the sport as is over the safer alternative, he has truly assumed the risk. *Id.* at 221.); Spell, *supra* note 1, at 173 (arguing to retain assumption of risk as a complete defense); Note, *Assumption of Risk in a Comparative Negligence System—Doctrinal, Practical, and Policy Issues: Kennedy v. Providence Hockey Club, Inc.; Blackburn v. Dorta*, 39 OHIO ST. L.J. 364, 378–79 (1978) (suggesting "that (1) express assumption of risk should remain a complete bar to recovery, and (2) implied assumption of risk of both the reasonable and unreasonable varieties should be subjected to comparative negligence apportionment principles").

⁹ See, e.g., *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977); *Hull v. Merck & Co.*, 758 F.2d 1474 (11th Cir. 1985) (applying Georgia law) (plaintiff, who contracted leukemia after he was exposed to chemicals while working on replacement of waste lines, was barred from recovery). See *infra* note 20 and accompanying text.

¹⁰ James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968) (articulating an argument often quoted by assumption of risk abolitionists: "the doctrine deserves no separate existence (except for *express* assumption of risk) and is simply a confusing way of stating certain no duty rules or, where there has been a breach of duty toward plaintiff, simply one kind of contributory negligence." *Id.* at 190.); see also 4 F.

approach, assumption of risk is generally held a complete defense when it is part of an express contractual agreement,¹¹ except when standard contract doctrine invalidates the agreement.¹² Implied assumption of risk, derived merely from the behavior rather than an express agreement by the plaintiff, ceases to exist under this approach. To the extent that implied assumption of risk overlaps with contributory negligence, this second approach allows a plaintiff's unreasonable behavior to be characterized as comparative negligence, thereby remaining a partial defense. To the extent that implied assumption of risk is deemed reasonable and consequently does not overlap with contributory negligence, implied assumption of risk ceases to be any defense.

A third approach also dissects assumption of risk, but reaches a contrary result.¹³ As under the second approach, express assumption of risk is

HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* 259 (2d ed. 1986); *Symposium: Assumption of Risk*, 22 LA. L. REV. 1 (1961); Rosenlund & Killion, *supra* note 1, at 271 n.247 (for a list of courts abolishing assumption of risk). *See infra* note 45 and accompanying text.

¹¹ "A plaintiff who expressly agrees to accept a risk of harm arising from the defendant's negligent" conduct is barred from recovery. RESTATEMENT (SECOND) OF TORTS, *supra* note 4, at § 496B. Some jurisdictions take a more expansive view of express assumption of risk than does the *Restatement*. *See* Kuenher v. Green, 436 So. 2d 78, 81 (Fla. 1983) (participant in Karate match deemed to have consented to risk of negligent kick); Blackburn v. Dorta, 348 So. 2d 287, 290 (Fla. 1977) (express assumption of risk is present in "situations in which actual consent exists such as where one voluntarily participates in a contact sport"); Arbegast v. Board of Educ., 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985) (woman who was informed of dangers of riding donkey, and who proceeded to ride, was found to have expressly assumed the risk of injury). In *Arbegast*, the finding of express assumption of risk was based not on a formal written or oral contract, but rather on the plaintiff's conduct. *Id.* at 162, 480 N.E.2d at 366, 490 N.Y.S.2d at 752. *See infra* note 45 and accompanying text.

¹² *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 4, at § 496B. ("A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct can not recover for such harm, unless the agreement is invalid and contrary to public policy."). *See, e.g.,* Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (invalidating a patient's express agreement to assume risks of negligent practice of medicine).

¹³ *See* V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 9.1 at 156 (2d ed. 1986) (explaining that *Restatement (Second) of Torts* allows reasonable implied assumption of risk to bar a plaintiff's claim). *But see* Note, *Comparative Negligence and Assumption of Risk—The Case for Their Merger*, 56 MINN. L. REV. 47, 53–58 (1971–72) (hypothetical situations used by the *Restatement* are not examples of reasonable implied assumption of risk). For judicial support, see *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 243 Cal. Rptr. 536 (1988) (a jockey's lawsuit for injuries sustained when another

governed by contract law, and reasonable implied assumption of risk is distinguished from unreasonable implied assumption of risk. Similarly, unreasonable assumption of risk, when it overlaps with contributory negligence, remains a partial defense under comparative negligence principles. In sharp contrast with the second approach, however, reasonable implied assumption of risk is treated as a complete defense rather than no defense.

Although all three approaches have normative appeal, contradictions exist. Maintenance of assumption of risk in all its manifestations, the first approach, recognizes the plaintiff's voluntary "consent"¹⁴ to exposure to risks. Such consent goes beyond mere contributory negligence by the plaintiff, and thus seems to justify a distinction between the partial defense of comparative negligence and the total defense of assumption of risk. One problem is that this approach asks only whether the plaintiff assumed the risk, and does not weigh the relative culpability of the plaintiff's behavior. As a result, behavior indicating assumption of risk is a complete defense, even when reasonable or only slightly unreasonable. But highly unreasonable behavior that does not constitute assumption of risk is only a partial bar to recovery under comparative negligence.

The second approach, which distinguishes between express and implied assumption of risk and reasonable and unreasonable implied assumption of risk, also has normative appeal. Reasonable assumption of risk, which, by definition, involves no culpability,¹⁵ arguably should not be a defense.

jockey violated a rule prohibiting interference was barred because the plaintiff reasonably assumed the risk of injury); *see infra* note 87 and accompanying text. *See also*, *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037, 1042 (1985); *Siglow v. Smart*, 43 Ohio App. 3d 55, 539 N.E.2d 636 (1987); *Fish v. Gosnell*, 316 Pa. Super. 565, 463 A.2d 1042, 1048-49 (1983).

¹⁴ *See* W. KEETON & D. DOBBS, *supra* note 1, at 484-85; *Rosenlund & Killion*, *supra* note 1, at 243. A criticism of this view is that "assumption of risk . . . is an uneasy concept to rely upon because it necessarily injects a degree of fiction, . . . carries connotations of active agreement . . . [and] a willingness to accept all consequences that flow from [a] . . . course of conduct as to which consent is given." But in the usual case where a plaintiff takes a reasonable risk, he hopes he will not be injured and expects recourse if he is injured. *Shaw, The Role of Assumption of Risk in Systems of Comparative Negligence*, 46 INS. COUNS. J. 360, 405 (1979). *See also* V. SCHWARTZ, *supra* note 13, § 9.1, at 154 ("In actual cases this basis [of consent] is usually fictional because the injured party has not truly manifested his consent to hold the defendant blameless; rather, the law treats him as if he had done so.").

¹⁵ For a contrary view, *see* Spell, *supra* note 1, at 159. "The retention of reasonable assumption of risk is neither illogical nor grossly inequitable. . . . The risk assuming plaintiff having greater culpability than the merely negligent plaintiff, it is neither illogical

Unreasonable assumption of risk, on the other hand, does involve plaintiff culpability and should, like other variants of contributory negligence, be a partial defense. Despite its logical appeal, the second approach leads to problems in application. Although a continuum exists between express and implied assumptions of risk, at some point the second approach must draw an arbitrary line between the two that is costly for the plaintiff to cross. A counter-argument, however, is that the distinction should be retained since an express contract-like agreement represents an unambiguous statement of the plaintiff's intent to expose herself or himself to danger.

The third approach, currently accepted by still other courts,¹⁶ might at first blush offer more contradictions than appeal. As in the second approach, express and implied assumption of risk are treated very differently. Furthermore, in an almost *Alice in Wonderland* script, under implied assumption of risk, plaintiffs who behave reasonably in assuming a risk face a complete bar to recovery, while plaintiffs acting unreasonably benefit from comparative fault principles and may recover substantial portions of their damages.¹⁷ Consequently, to maximize recovery, the plaintiff's attorney must argue that his or her client was, however slightly, unreasonable. The defense attorney ideally would characterize the plaintiff's assumption of risk as perfectly reasonable for a total bar, or as a second best alternate, extremely unreasonable so as to minimize plaintiff's ability to recover under comparative negligence.

Yet the third approach has both normative and economic appeal. It may be argued that the plaintiff who reasonably assumes the defendant's negligence has been fairly compensated for his or her risks:¹⁸ Compensation

nor inequitable to apply a more 'demanding standard' to the knowledgeable plaintiff than his 'less learned contemporaries.'" *Id.* at 172 (citing Keeton, *Assumption of Risk in Products Liability Cases*, 22 LA. L. REV. 122, 158-59 (1961)).

¹⁶ See *supra* note 13.

¹⁷ Critics attack this by arguing that reasonable implied assumption of risk must be abolished to "prevent the illogical and grossly inequitable result of preventing recovery by a plaintiff who acts reasonably, but allowing it to a plaintiff who acts unreasonably." Van Eman, *Ohio's Assumption of Risk: The Deafening Silence*, 11 CAP. U.L. REV. 661, 679 (1982). But see *supra* note 13 for a rebuttal.

¹⁸ The economic appeal of the third approach is evident in the firefighters' rule implemented in a large majority of jurisdictions. "The firefighters' rule bars tort claims by firefighters and police officers against persons whose negligence or recklessness causes the fire or other hazard that injures the officer." Comment, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale*, 71 CALIF. L. REV. 218 (1983) (citing *Walters v. Sloan*, 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977)). Firefighters and police officers are compensated for their duties with salary, disability, and pension benefits. "Given the existence of the statutory compensation scheme, tort

for a dangerous job reasonably undertaken, whether it is fire fighting or making a high risk repair as in this Article's opening hypothetical, presumably includes fair advance payment for assuming the risks inherent in such employment. On the other hand, the unreasonable plaintiff, by definition, did not reasonably evaluate the prospective risks and benefits of a dangerous job. This indicates that, while the plaintiff was "unreasonable" and thereby arguably at fault, he or she may also have been inadequately compensated for assuming the risk. Hence, comparative fault allows the jury the opportunity to make appropriate compensation.

The purpose of this Article is to evaluate these three predominant judicial approaches to the interaction of assumption of risk with comparative fault. Ultimately, this Article will argue that current tort classification inadequately addresses the assumption of risk problem and that, in this context, courts must rely more heavily on principles of limited duty and on contract law to achieve a proper result.¹⁹ Limited duty better serves to effectuate equitable and efficient outcomes than do subjective assessments of reasonable implied assumption of risk. When appropriate, courts can formulate new limited duties in certain specific factual situations. Express assumption of risk should be enforced and governed by the applicable doctrines of contract law. In the absence of an enforceable contract or an articulated tort policy of limited duty, courts should apply comparative negligence principles to determine the amount of recovery under implied assumption of risk.

liability must be precluded whenever the [firefighters'] rule applies lest the public pay twice for injuring its officers: once through taxes to support the statutory compensation system, and again through insurance rates increased to reflect tort judgments against individuals." *Id.* at 236. According to Rosenlund & Killion, *supra* note 1, at 283, "the California Supreme Court's decisions on the firefighters' rule are at least consistent with the continued existence of reasonable implied assumption of risk as a complete bar under comparative fault."

¹⁹ See Epstein, *supra* note 8, at 87, for a similar view in the context of medical malpractice.

Chart of Alternative
Approaches to Assumption of Risk ("A/R")

	Express A/R	Reasonable Implied A/R	Unreasonable Implied A/R
Approach One	Complete defense	Complete defense	Complete defense
Approach Two	Complete defense	No defense	Partial defense
Approach Three	Complete defense	Complete defense	Partial defense

II. APPROACH ONE: ASSUMPTION OF RISK AS A COMPLETE DEFENSE

Rhode Island is among the few jurisdictions that appear to maintain assumption of risk as a complete defense in all circumstances despite transforming contributory into comparative negligence.²⁰

²⁰ See V. SCHWARTZ, *supra* note 13, § 9.3, at 162-63, for a review of other states that have maintained assumption of risk after adopting comparative negligence. Schwartz lists the following states as retaining assumption of risk: Georgia, Mississippi, Nebraska, Rhode Island, and South Dakota. *Id.*

According to Schwartz, Georgia continues to apply the assumption of risk defense vigorously, but "the Georgia cases should not be regarded as precedents in other comparative negligence jurisdictions" because "Georgia's system of comparative negligence is a unique court-created blend of two statutes, neither of which was a general comparative negligence law." *Id.* at 166. The Mississippi Supreme Court, in *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973), declined to abolish assumption of risk, but "limited the operation of implied assumption of risk by holding that in cases where assumption of risk and contributory negligence overlap, comparative negligence rules will apply." V. SCHWARTZ, *supra* note 13, at 165.

Further, as Schwartz notes, Mississippi appears not "to permit the defense when plaintiff has *reasonably* assumed a known risk . . ." or, at least, to leave the issue to the jury. *Id.* at 164. See, e.g., *Elias v. New Laurel Radio Station*, 245 Miss. 170, 146 So. 2d 558 (1962) (plaintiff slipped on liquid left on floor of bowling alley). "Nebraska and South Dakota seem to apply implied assumption of the risk as a complete defense only

The Rhode Island Supreme Court makes a significant distinction between comparative negligence and assumption of risk.²¹ In *Kennedy v. Providence Hockey Club*,²² a spectator at a hockey game was struck by a puck. The court held that the spectator had knowingly consented to the risk and consequently should be completely barred from recovery. The consent was considered voluntary despite the fact that safer seats were no longer available.²³ The plaintiff in *Kennedy* had attended many prior hockey games and subjectively knew of the risk.²⁴

While the Rhode Island court professes to allow assumption of risk in all circumstances,²⁵ the court has been particularly rigorous in enforcement where the plaintiff appears unreasonable. In *Drew v. Wall*,²⁶ the mother of the decedent brought a wrongful death action against the decedent's employer. The decedent, an assistant superintendent of maintenance, was asphyxiated while operating an internal combustion engine in an enclosed area against the defendant's specific instructions.²⁷ The court found that the plaintiff clearly assumed the risk of asphyxiation by restarting the engine after he began to feel dizzy and before climbing out of the enclosure. Since

where plaintiff's conduct has been unreasonable." V. SCHWARTZ, *supra* note 13, at 165.

Rhode Island is the only state in which a court has "engage[d] in a reasoned discussion of why the assumption of risk defense should continue after comparative negligence has been adopted." *Id.* at 163.

²¹ A finding of comparative negligence does not necessarily result in a finding of assumption of risk since the plaintiff must subjectively recognize the risk. *Soucy v. Martin*, 121 R.I. 651, 402 A.2d 1167 (1979) (plaintiff did not appreciate risk of carrying steel beams that he knew nothing about). *Id.* at 654, 402 A.2d at 1169. *See also* *Huesten v. Narrigansett Teams Club*, 502 A.2d 827 (R.I. 1986) (jury could find plaintiff never appreciated risk of retrieving tennis ball).

²² 119 R.I. 70, 376 A.2d 329 (1977).

²³ *Id.* at 76, 376 A.2d at 332-33. The plaintiffs sat in the fourth row, section F, of the coliseum. Because they purchased their tickets late, these were the last seats available. The barrier for this section "protected only those patrons in the first three rows." *Id.* at 73, 376 A.2d at 331.

²⁴ The plaintiff had attended 30 or 40 games at the auditorium and viewed several on television, during which she had seen pucks enter the crowd. *Id.* at 73, 376 A.2d at 331.

²⁵ The court in *Kennedy* held that assumption of risk is still viable and that it does not overlap with contributory negligence. *Id.* at 73-75, 376 A.2d at 331-32.

²⁶ 495 A.2d 229 (R.I. 1985).

²⁷ *Id.* at 230-31. The plaintiff was hired to pump accumulated water out of a sewage pit. The defendant instructed the plaintiff to place the pump outside the pit and not to enter the pit. When the defendant later visited the work site, he found the plaintiff and the pump in the pit. He ordered the plaintiff to leave the pit and allow the pump to run out of gas before removing it. *Id.*

assumption of risk was a complete defense, the court did not have to determine whether the defendant was negligent.

Similarly, in *Rickey v. Boden*,²⁸ the Rhode Island Supreme Court held that an employee who had utilized stairs without a railing to reach a coffee room for her coffee break had “voluntarily” assumed the risk. The majority concluded that the plaintiff, who had used the stairway often, knew about the missing railing. Furthermore, the majority concluded that the plaintiff had “voluntarily” exposed herself to the risk since she could have taken a coffee break off the premises,²⁹ used a freight elevator to reach the break room,³⁰ or walked on the wider portion of the stairway treads. A dissenting opinion questioned whether the plaintiff’s use of the stairs was correctly viewed as optional absent factual findings concerning weather conditions.³¹

In both of these cases, the Rhode Island Supreme Court found a “voluntary” exposure to risk where the facts suggest that the plaintiffs had clear alternatives and had unreasonably exposed themselves to unnecessary risks. Indeed, the dissent in *Rickey* would consider severe weather conditions in determining whether there actually were any reasonable alternatives that would make the plaintiff’s decision voluntary. In *Iadevaia v. Aetna Bridge Co.*,³² however, the Rhode Island Supreme Court went to great lengths to uphold a jury verdict in favor of a plaintiff worker who continued, despite severe back pain, to operate a backhoe to which a bridge company had attached defective equipment. Although the worker complained of back pain and was “an experienced backhoe operator,” the court rejected the defendant’s contention that the plaintiff had knowingly gambled that he could

²⁸ 421 A.2d 539 (R.I. 1980).

²⁹ The plaintiff’s testimony indicates that fellow employees were permitted to leave the building during breaks. *Id.* at 544.

³⁰ The court concluded, for the purposes of review of a directed verdict, that the elevator was not an option, although this is questionable. *Id.* at 544 n.6.

³¹ *Id.* at 545. The accident occurred in January. *Id.* at 541. If the weather in Rhode Island at this time was harsh, the plaintiff may not reasonably have had the option of a coffee break off the premises.

³² 120 R.I. 610, 389 A.2d 1246 (1978). This action was brought in 1972. The Legislature enacted a comparative negligence statute in 1971 that was to apply to “all actions hereafter brought.” 1971 R.I. Pub. Laws 206 [now R.I. GEN LAWS § 9-20-4 (1956) (1985 Reenactment)]. Although the litigants chose “to treat this suit as not coming within the ambit of the statute,” *Iadevaia*, 120 R.I. at 614, 389 A.2d at 1249, this case still helps to clarify the status of assumption of risk after *Kennedy*.

avoid back injury.³³ Instead, the court distinguished between the acceptance of back pain and knowledge of the risk of a ruptured disc.³⁴

Notably, in analyzing the plaintiff's potential contributory negligence, the court conceded that "when Anthony complained to Aetna's supervisory personnel about the second hammer [attached to the backhoe] wearing out, they told him to be patient" because they expected delivery of a new hammer.³⁵ From this the court concluded that, if the plaintiff refused to continue, he "would obviously be replaced."³⁶ In light of this conclusion, the court refused to upset the jury's finding that the plaintiff had acted reasonably.³⁷

At first glance, the factual analysis in *Iadevaia* appears to contradict the analysis in *Drew*. The court seems to apply different standards to the requirement that assumption of risk be a "knowing" exposure to risk. In *Drew*, knowledge of the risk of entering a pit with the combustion engine operating was established when the plaintiff began to feel dizzy and decided to restart the engine and climb out. Thus, in *Drew* a few moments of dizziness constituted knowledge of the risk of asphyxiation, but in *Iadevaia*, extended back pain did not constitute knowledge of a risk of more serious back injury.

The Rhode Island Supreme Court decisions can in fact be distinguished on other grounds. The plaintiffs in *Drew* and *Rickey* were arguably unreasonable in exposing themselves to risks, while the plaintiff in *Iadevaia*, at least in the court's view, acted reasonably. The court in *Iadevaia* chose not to question the voluntariness of the plaintiff's decision³⁸ to continue working, but it was clearly sensitive to the potential economic risk facing the plaintiff if he stopped working. The *Iadevaia* court may have granted that the

³³ *Iadevaia*, 120 R.I. at 617, 389 A.2d at 1250.

³⁴ *Id.* at 616, 389 A.2d at 1250.

³⁵ *Id.* at 617, 389 A.2d at 1250-51.

³⁶ *Id.* at 618, 389 A.2d at 1251.

³⁷ *Id.* at 618-19, 389 A.2d at 1251.

³⁸ The voluntary requirement gives the court some power to narrow or widen the scope of the assumption of risk defense. Some courts avoid holding that a plaintiff who acted reasonably assumed the risk by stretching the analysis to find the plaintiff did not make a voluntary choice. *See, e.g.,* *Rush v. Commercial Realty Co.*, 7 N.J. Misc. 337, 145 A. 476 (1929) (plaintiff who, with knowledge of defective floor, entered outhouse provided by landlord and fell into pit below "had no choice, when impelled by the calls of nature," but to use the privy and thus did not assume the risk of injury. *Id.* at 338, 145 A. at 476.). The court in *Rickey*, may have done just the reverse, stretching to hold the plaintiff voluntarily assumed the risk of falling from the stairs. *See supra* notes 28-31 and accompanying text.

plaintiff voluntarily exposed himself to danger, but it enforced the knowledge requirement of assumption of risk far more aggressively than in *Drew*. Although unstated, the court in *Iadevaia* arguably negated the defense of assumption of risk because the plaintiff, unlike the plaintiff in *Rickey*, was perceived as acting reasonably.

In these three Rhode Island Supreme Court cases, all decided since enunciating the rule in *Kennedy*, Rhode Island has used the “knowledge” or “voluntary” elements of assumption of risk to preclude recovery for unreasonable assumption of risk.³⁹ *Kennedy* itself might appear to be the exception. There is no suggestion in the facts that the plaintiffs were unreasonable in their decision to sit in the coliseum seats they chose.⁴⁰ On the other hand, there is also no suggestion that the coliseum was negligent in the design of the plaintiffs’ seating location.⁴¹ Consequently, the case can be viewed as the plaintiffs’ reasonable decision to expose themselves to a reasonable risk. In short, the defendant was not negligent. The assumption of risk defense was redundant to a finding of no negligence.⁴² In the *Drew* case there was also a serious question whether the defendant was negligent;⁴³ the court specifically did not address the issue since the finding of assumption of risk made such an analysis unnecessary.

Rhode Island stands almost alone⁴⁴ in endorsing the full maintenance of assumption of risk in conjunction with comparative fault. In fact, however, where assumption of risk would negate defendant’s culpability, the Rhode Island Supreme Court has maintained the defense only where the plaintiff has also acted unreasonably and demonstrated clear fault.

³⁹ See also *Filosan v. Courtois Sand & Gravel Co.*, 590 A.2d 100 (R.I. 1991), where assumption of risk was upheld in a wrongful death action. The decedent was found to have made “reckless attempts to remove his property” from a destroyed building undergoing clean-up operations by the decedent. The court concluded that the defendant was probably not negligent. Regardless, the decedent had, by his reckless conduct, voluntarily exposed himself to defendant’s negligence.

⁴⁰ See *supra* note 23.

⁴¹ The facts show that the coliseum did provide protected seating for those who purchased their tickets in advance.

⁴² Some courts consider a lack of duty owed by the defendant as “primary assumption of risk.” See F. HARPER, F. JAMES & O. GRAY, *supra* note 10, § 21.0, at 188–89. “In its primary sense the plaintiff’s assumption of a risk is only the counterpart of the defendant’s lack of duty to protect the plaintiff from [a particular] risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it.” *Id.* (quoting *Flowers v. Sting Sec.*, 62 Md. App. 116, 135, 488 A.2d 523, 533 (1985), *aff’d*, 308 Md. 432, 520 A.2d 361 (1985)).

⁴³ See *supra* note 27 and accompanying text.

⁴⁴ See *supra* note 20.

III. APPROACH TWO: ABOLITION OF REASONABLE IMPLIED ASSUMPTION OF RISK

Some jurisdictions have ostensibly abolished the tort doctrine of implied assumption of risk.⁴⁵ The Florida Supreme Court decision, *Blackburn v. Dotra*,⁴⁶ illustrates this position. Previously the Florida court had abolished contributory negligence and adopted comparative fault.⁴⁷ In *Blackburn*, the Florida Supreme Court merged the defense of implied assumption of risk into comparative negligence.⁴⁸ The court concluded that implied assumption of risk served “no purpose which is not subsumed by either the doctrine of contributory negligence or the common law concept of duty.”⁴⁹

Blackburn supports its conclusion by dividing implied assumption of risk initially into two categories: primary and secondary.⁵⁰ “Primary” assumption of risk arises where the defendant was not negligent because he or she either owed no duty to the plaintiff or did not breach a duty that was owed.⁵¹ As an example, the court notes that while a passenger does assume the risks of lurches and jerks which are ordinary to the proper operation of a railroad train, the assumption of risk defense is unnecessary since the railroad has not behaved negligently toward the plaintiff.⁵²

The *Blackburn* court defines implied secondary assumption of risk to include cases where the defendant has in fact breached his or her duty to the plaintiff. The *Blackburn* case further divides implied secondary assumption

⁴⁵ See Rosenlund & Killion, *supra* note 1, at 271 n.249 (for a list of courts abolishing assumption of risk). See, e.g., *Parker v. Redden*, 421 S.W.2d 586, 592 (Ky. 1967); *Wilson v. Gordon*, 354 A.2d 398, 401-03 (Me. 1976); *Abernathy v. Eline Oil Field Serv.*, 200 Mont. 205, 209, 650 P.2d 772, 775-76 (1982).

⁴⁶ 348 So. 2d 287 (Fla. 1977).

⁴⁷ *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). “[T]he jury should apportion the negligence of the plaintiff and the negligence of the defendant; then, in reaching the amount due the plaintiff, the jury should give the plaintiff only such an amount proportioned with his negligence and the negligence of the defendant.” *Id.* at 438.

⁴⁸ *Blackburn*, 348 So. 2d at 293.

⁴⁹ *Id.* at 289.

⁵⁰ For an extensive discussion of this distinction, see *Meistrich v. Casino Arena Attractions*, 31 N.J. 44, 155 A.2d 90 (1959); F. HARPER, F. JAMES & O. GRAY, *supra* note 10.

⁵¹ *Blackburn*, 348 So. 2d at 290.

⁵² *Id.* at 291.

of risk into two categories: reasonable and unreasonable assumption of risk.⁵³ Unreasonable assumption of risk overlaps with comparative negligence and in the Florida court's view should be subsumed by that defense. Unlike the Rhode Island court, the Florida court thus does not consider whether the plaintiff had knowledge of potential risks; any unreasonable behavior serves to limit the plaintiff's recovery under comparative negligence rules.

Implied reasonable assumption of risk is entirely rejected by the *Blackburn* decision.⁵⁴ The court posits the hypothetical of a tenant injured while rushing into a burning building that the landlord has negligently allowed to become highly flammable. If the tenant is voluntarily exposing himself to the landlord's negligence in order to save an infant, he will be barred from recovery under the doctrine of reasonable implied assumption of risk. The court in *Blackburn* reasons that such a result is patently unjust and concludes that "there is no reason supported by law or justice in this state to give credence to such a principle of law."⁵⁵ While some other jurisdictions might avoid barring the plaintiff in this illustration by characterizing his behavior as involuntary,⁵⁶ the *Blackburn* decision instead concludes implied assumption of risk as a distinct doctrine should be abolished.

The Florida Supreme Court in *Blackburn* specifically excludes from consideration "express assumption of risk," which it characterizes as "a contractual concept."⁵⁷ The court includes within its definition of express assumption of risk "express contracts not to sue for injury or loss which may thereafter be occasioned by the covenantor's negligence as well as situations in which actual consent exists such as where one voluntarily participates in a contact sport."⁵⁸

While the Florida Supreme Court argues unflinchingly that reasonable implied assumption of risk should be abolished as a defense, the jurisdiction continues to expand the definition of express assumption of risk to include

⁵³ Reasonable assumption of risk is also referred to as "pure" or "strict" assumption of risk, and unreasonable assumption of risk is also called "qualified" assumption of risk. *Id.*

⁵⁴ "There is little to commend this doctrine of implied—pure or strict—assumption of risk, and our research discloses no Florida case in which it has been applied." *Id.*

⁵⁵ *Id.*

⁵⁶ See *supra* note 38.

⁵⁷ *Blackburn*, 348 So. 2d at 290.

⁵⁸ *Id.*

other "situations in which actual consent exists."⁵⁹ This exception has been pushed well beyond both traditional contractual definitions⁶⁰ and the *Restatement of Torts* requirement of an "express agreement."⁶¹

In *Kuehner v. Green*,⁶² the Florida Supreme Court held that a plaintiff injured in a karate sparring match had subjectively recognized the danger of a leg sweep and had voluntarily proceeded to spar in the face of such danger. The court relied on the language in *Blackburn* that expands the definition of express assumption of risk to include participation in contact sports. Despite the fact that the plaintiff had not, in the usually understood sense of the term, "expressly" agreed to waive his right to sue, the court held that express assumption of risk existed and sustained the judgment for the defendant.

In *Ashcroft v. Calder Race Course*,⁶³ the Florida Supreme Court reaffirmed its decision in *Blackburn* and *Kuehner* that "express assumption of risk" be applied to voluntary participants in contact sports. Nevertheless, the court declined to apply the doctrine to an injured jockey who alleged the race track was negligent in the placement of an exit gap on the race track. The court concluded that "express assumption of risk waives only risks inherent in the sport itself [and] . . . that riding on a track with a negligently placed exit gap is not an inherent risk in the sport of horse racing."⁶⁴

Consequently, while the Florida Supreme Court's *Blackburn* decision is noted for its rejection of implied assumption of risk, the supreme court and lower appellate courts in the state have extended the concept of "express assumption of risk" far beyond its traditional definition. Indeed, the Florida Supreme Court in *Kuehner*, in discussing a jury's role in determining whether a participant "actually consented" to a risk, noted:

If it is found that the plaintiff recognized the risk and proceeded to participate in the face of such danger the defendant can properly raise the defense of *express* assumption of risk. "Voluntary exposure is the bedrock upon which the doctrine of assumed risks rests." Here, even though the

⁵⁹ *Id.*

⁶⁰ "When the parties manifest their agreement by words [written or spoken] the contract is said to be express." J. CALAMARI & J. PERILLO, *CONTRACTS* § 1-12, at 19 (3d ed. 1987). See also Note, *The Reemergence of Implied Assumption of Risk in Florida*, 10 NOVA L.J. 1343, 1354 (1986) ("Traditionally, the courts applied express assumption of risk to contracts, releases and waivers. Implied assumption of risk was applied in all other situations.").

⁶¹ See *supra* note 11.

⁶² 436 So. 2d 78 (Fla. 1983).

⁶³ 492 So. 2d 1309 (Fla. 1986).

⁶⁴ *Id.* at 1311.

defendant breached his duty of care and was negligent, the plaintiff should be barred from recovery because he in some way consented to the wrong.⁶⁵

The Florida Supreme Court, in *Mazzeo v. City of Sabastian*, acknowledged that "[t]he knowing and voluntary participation in contact sports is at best only loosely characterized as an *express* assumption of risk."⁶⁶ The court, nevertheless, concluded that "participation in a contact sport with full knowledge and appreciation of the danger" should constitute express assumption of risk in order to protect participants from unwarranted liability.⁶⁷ The Florida court in *Mazzeo* rejected lower Florida appellate court decisions that had extended the concept of express assumption of risk to include "aberrant conduct in non-contact sports."⁶⁸ In *Mazzeo*, itself, the court rejected defense efforts to characterize plaintiff's dive into shallow water in an artificial lake, despite signs warning against diving, as express assumption of risk.⁶⁹

The Florida court's definition of express assumption of risk, at least in the context of contact sports,⁷⁰ is virtually identical to the traditional definition of implied assumption of risk. Some of the Florida courts' application of assumption of risk could be characterized as primary assumption of risk—where the defendant was not in fact negligent in

⁶⁵ *Kuehner v. Green*, 436 So. 2d 78, 80 (Fla. 1983) (quoting *Bortholf v. Bakes*, 71 So. 2d 480, 483 (Fla. 1954)).

⁶⁶ 550 So. 2d 1113, 1116 (Fla. 1989).

⁶⁷ *Id.*

⁶⁸ *Id.* at 1113.

⁶⁹ Previously, lower appellate courts in Florida had extended the concept of express assumption of risk to include a variety of activities. *See, e.g.*, *Van Tuyn v. Zurick Am. Ins. Co.*, 447 So. 2d 318 (Fla. App. 1984) (mechanical bull riding); *Black v. District Bd. of Trustees*, 491 So. 2d 303 (Fla. Dist. Ct. App. 1986) (police training exercises); *Robbins v. Dep't of Natural Resources*, 468 So. 2d 1041 (Fla. Dist. Ct. App. 1985) (knowingly diving into water); *Carvajal v. Alvarez*, 462 So. 2d 1156 (Fla. Dist. Ct. App. 1984) (horseback riding with another rider on a single saddle); *Strickland v. Roberts*, 382 So. 2d 1338 (Fla. Dist. Ct. App. 1982) (water skiing too close to a dock); *O'Connell v. Walt Disney World*, 413 So. 2d 444 (Fla. Dist. Ct. App. 1982) (pony riding). *See also* *Kendrick v. Ed's Beach Serv.*, 577 So. 2d 936 (Fla. 1991) (reporting on facts similar to *Mazzeo* and rejecting efforts to bar recovery on proximate cause grounds).

⁷⁰ "It is significant that the factors that the court [in *Kuehner*] examined to determine the appropriate application of express assumption of risk in the context of contact sports are the very same factors which were necessary before *Blackburn* to support the defense of implied assumption of risk." Note, *supra* note 60, at 1362.

providing, for example, ponies or a mechanical bull.⁷¹ Yet, as indicated expressly by the Florida Supreme Court in the above quotation from *Kuehner*, this extended "express assumption of risk" is also intended as a defense to negligence, provided the plaintiff "in some way consented to the wrong." There is no indication that the extended definition of express assumption of risk is limited to situations where the plaintiff alone is negligent.⁷² A plaintiff may reasonably choose to expose herself or himself to negligence in certain activities and be barred from recovery even when the consent is merely implied from participation and there is in fact no express consent.

Florida is not alone in ostensibly rejecting implied assumption of risk only to allow it under the category of "express" assumption of risk.⁷³ A continuum between express and implied assumption of risk has emerged from many jurisdictions' struggles to formulate a definition of express assumption of risk. For example, Idaho requires an express assumption of risk to be "manifested by direct and appropriate language."⁷⁴ In *Arbegast v. Board of Education*,⁷⁵ New York expanded on Idaho's approach by finding express assumption of risk where, upon being informed that participants of donkey basketball act at their own risk, the plaintiff simply climbed onto a donkey.

⁷¹ In a concurring opinion to *Kuehner*, Justice Boyd criticized the use of express assumption of risk in that case as "absurd legal semantics." *Kuehner*, 436 So. 2d at 81 (Boyd, J., concurring). The same result could be reached by characterizing the duty of the defendant as a duty to refrain from intentional or reckless misconduct not customary to karate sparring matches. *Id.*

⁷² See *Robbins v. Department of Natural Resources*, 468 So. 2d 1041, 1042-43 (Fla. Dist. Ct. App. 1985) (defendant did not post "no diving" signs or place railings around shallow pool into which plaintiff dove, injuring himself).

⁷³ There is yet another method by which an appellate court in Florida has attempted to limit the concept that reasonable assumption of risk is not a bar to recovery. A very recent Florida Appellate decision, *Anicet v. Gant*, 580 So. 2d 273 (Fla. 1991) extrapolated from the firefighters' immunity, which precludes firefighters from suing for injuries incurred on the job from expected hazards, to find a general limited duty. The court noted that "a person specifically hired to encounter and combat particular dangers is owed no independent tort duty by those who have created those dangers . . . even if . . . defendant is actually guilty of negligence." The court also relied on the doctrine that "a landowner is not liable for negligently creating a condition to a contractor or other expert who was specifically hired to repair it." See also 41 AM. JUR. INDEPENDENT CONTRACTORS § 28 (1961). In *Anicet*, the attendant for a violent insane person was precluded from suing for injuries suffered by the insane patient.

⁷⁴ *Messmer v. Ker*, 96 Idaho 75, 80, 524 P.2d 536, 541 (1974) (citing BLACK'S LAW DICTIONARY 691 (rev. 4th ed. 1968)). See *supra* note 11.

⁷⁵ 65 N.Y.2d 161, 480 N.E.2d 365 (1985).

Florida goes further by characterizing mere participation in activities as constituting express assumption of risk in some cases.⁷⁶

IV. APPROACH THREE: IMPLIED REASONABLE ASSUMPTION OF RISK AS A COMPLETE DEFENSE

The California Supreme Court has not made a definitive ruling on the relationship between comparative negligence and assumption of risk.⁷⁷ A decisive majority of appellate decisions in California, however, reflects an emerging third alternative approach to the problem: While unreasonable implied assumption of risk is treated as comparative negligence, reasonable implied assumption of risk as well as express assumption of risk remains a complete defense.⁷⁸ This, as indicated above, directly contrasts with

⁷⁶ Compare Florida's approach to contact sports with that of New Mexico. In *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (N.M. Ct. App. 1983), the court classified "participation in a football game . . . an implied consent to normal risks attendant to bodily contact permitted by the rules of the sport." *Id.* at 463, 672 P.2d at 292. Because assumption of risk has been subsumed by contributory negligence in New Mexico, the reasonable sports participant would not be barred from recovery. The court in *Kabella*, however, like Florida courts, chose to make an exception and bar contact sports participants from recovery for negligence. *Id.* at 465, 672 P.2d at 294. Unlike Florida, New Mexico does not label this exception assumption of risk.

⁷⁷ On May 23, 1990, the California Supreme Court granted review of two cases that reached opposite conclusions on the issue: *Harrold v. Rolling Ranch*, 791 P.2d 290, 269 Cal. Rptr. 720 (1990) (reasonable implied assumption of risk was abolished in an action brought by a plaintiff who was thrown from a horse) and *Ford v. Gouin*, 791 P.2d 290, 269 Cal. Rptr. 720 (1990) (reasonable implied assumption of risk was *not* abolished in an action brought by a water skier); see *infra* note 93 and accompanying text. Appellate court decisions have maintained the viability of reasonable implied assumption of risk where the plaintiff is taking on a risk inherent in a profession or as part of an athletic activity. See *Saenz v. Whitewater Voyages, Inc.*, 226 Cal. App. 3d 758, 276 Cal. Rptr. 672 (1991) (death occurred while whitewater rafting); *Krol v. Sampson*, 811 P.2d 10, 282 Cal. Rptr. 124 (1991) (injured during a softball game); *Buchan v. United States Cycling Fed'n*, 227 Cal. App. 3d 134, 227 Cal. Rptr. 887 (1991) (injured in a bicycle race); *Van Meter v. American Motor Sports Ass'n*, 811 P.2d 10, 282 Cal. Rptr. 124 (1991) (injured in an automobile race); *Cohen v. McIntyre*, 806 P.2d 842, 279 Cal. Rptr. 100 (1990) (veterinarian attacked by a dog); *Knight v. Jewett*, 225 Cal. App. 3d 886 (1990), *reh'g granted*, 804 P.2d 1300, 278 Cal. Rptr. 203 (1991) (hand injury sustained while playing football).

⁷⁸ Other state courts applying the majority California view include Illinois, Ohio, and Pennsylvania. See *supra* note 13. Some commentators support the majority view in California. See, e.g., V. SCHWARTZ, *supra* note 13, at 156 (explaining that *Restatement (Second) of Torts* allows reasonable implied assumption of risk to bar a plaintiff's claim).

Florida, which ostensibly abolished implied reasonable assumption of risk as a defense.⁷⁹

The California Supreme Court, in *Li v. Yellow Cab Co. of California*,⁸⁰ judicially created comparative negligence in California. The court expressly held that unreasonable implied assumption of risk should be absorbed by comparative fault.⁸¹ The court also held that express assumption of risk would remain a complete defense.⁸² The *Li* court did not, however, make clear the effect the adoption of comparative negligence would have upon reasonable implied assumption of risk:

Assumption of risk . . . overlaps . . . contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." We think it clear that the adoption of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence.⁸³

Most courts and commentators have concluded that the *Li* court left undecided whether reasonable implied assumption of risk remains a

See *infra* note 87 and accompanying text. See also *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037 (1985); *Siglow v. Smart*, 43 Ohio App. 3d 55, 539 N.E.2d 636 (1987); *Fish v. Gosnell*, 316 Pa. Super. 565, 463 A.2d 1042 (1983).

⁷⁹ See *supra* text accompanying notes 46-64.

⁸⁰ 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

⁸¹ *Id.* at 828, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

⁸² *Id.* at 824-25, 828-29, 532 P.2d at 1240, 1243, 119 Cal. Rptr. at 872-73, 875-76.

⁸³ *Id.* at 824-25, 532 P.2d at 1240, 119 Cal. Rptr. at 872-73 (quoting *Grey v. Fiberboard Paper Products Co.*, 65 Cal. 2d 240, 245-46, 418 P.2d 153, 156, 53 Cal. Rptr. 545, 548 (1966)).

defense.⁸⁴ Consequently, appellate decisions have differed on the status of the defense of reasonable implied assumption of risk.

In *Segoviano v. Housing Authority*, a California appellate court held that reasonable implied assumption of risk was abolished.⁸⁵ Thus, the plaintiff who participated in a flag football game was not barred from recovery, even though he reasonably assumed the risk of injury. The court argued that it is patently unfair to allow recovery to an unreasonable plaintiff and deny it to a reasonable one. The *Segoviano* court reasoned that "since reasonable implied assumption of risk plays no part in comparative negligence," the two cannot be merged.⁸⁶

Subsequent California appellate decisions rejected this reasoning. In *Ordway v. Superior Court*, an appellate court held that reasonable implied assumption of risk remained a defense.⁸⁷ In *Ordway*, a veteran professional jockey was injured when she was thrown from her mount during a quarter horse race. The court held that the plaintiff was completely barred from recovery because she had reasonably assumed the risk of injury.⁸⁸

The *Ordway* court recognized the seeming unfairness noted in *Segoviano*, of denying recovery to a reasonable plaintiff.⁸⁹ The court, however, was not persuaded: "Concededly it does sound strange to decree that unreasonable plaintiffs may recover and reasonable ones may not; but the problem is not of law but semantics. If the 'reasonable-unreasonable'

⁸⁴ See *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 103, 243 Cal. Rptr. 536, 541 (1988); *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 168, 191 Cal. Rptr. 578, 583 (1983).

⁸⁵ *Segoviano*, 143 Cal. App. 3d at 169, 191 Cal. Rptr. at 583.

⁸⁶ *Id.* at 170, 191 Cal. Rptr. at 585.

⁸⁷ *Ordway*, 198 Cal. App. 3d at 107, 243 Cal. Rptr. at 541. *Ordway* petitioned the California Supreme Court to review the trial court's denial of summary judgment. *Id.* at 101, 243 Cal. Rptr. at 537. The Supreme Court granted review and transferred the case to the appellate court. *Id.* at 101, 243 Cal. Rptr. at 537 (citing *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986)). Like *Ordway*, the plaintiff in *Turcotte* was also a jockey injured in a fall during a race. The New York court took the view that professional participation in a sport constitutes consent to injuries incident to the sport that are not caused by reckless or intentional behavior on the part of the defendant. *Turcotte*, 68 N.Y.2d at 440-41, 502 N.E.2d at 969-70, 510 N.Y.S.2d at 54-55.

⁸⁸ *Ordway*, 198 Cal. App. 3d at 112, 243 Cal. Rptr. at 549.

⁸⁹ *Id.* at 104, 243 Cal. Rptr. at 539. The court in *Segoviano*, found it counter-intuitive to punish a reasonable plaintiff more than an unreasonable plaintiff. *Segoviano*, 143 Cal. App. 3d at 170, 191 Cal. Rptr. at 583-84.

labels were simply changed to 'knowing and intelligent' versus 'negligent or careless,' the concepts would be more easily understood."⁹⁰

The court found the distinction between the reasonable and unreasonable plaintiff only superficially anomalous because, contrary to what the *Segoviano* court suggests, the explanation does not lie in punishing the plaintiff. Rather, the purpose of barring the plaintiff who reasonably assumes a risk is to protect the defendant where the defendant has no reason to expect to be liable for injury. The defendant need not take extra precautions with respect to reasonably assumed risks, but he must "anticipate the fool" and guard against risks unreasonably undertaken.⁹¹ Although it appears anomalous to allow the unreasonable plaintiff some recovery and the reasonable plaintiff none, the court attributes this perception to problems of semantics rather than the law.⁹²

In a more recent California appellate decision, *Ford v. Gouin*,⁹³ the case was made once again for the retention of implied reasonable assumption of risk. In *Ford*, the appellate court held that a water skier had reasonably assumed the risk that the driver of the boat might veer from a straight course and tow the skier into branches overhanging the waterway.⁹⁴ In *Ford*, there was a serious factual debate about whether the plaintiff skier was reasonable in his athletic endeavors at that particular location. The court heard expert testimony which established that the driver had transgressed the safe navigable width of the waterway, but nevertheless concluded that the skier's familiarity with the area rendered his participation "reasonable."⁹⁵ The plaintiff's ability to recover thus turned on a rather technical determination of reasonableness. To bar recovery *only* where the plaintiff is reasonable and to allow very substantial recovery where he is slightly unreasonable—especially where the factual determination on this point is close—appears to fail in achieving the results intended by courts advocating retention of implied reasonable assumption of risk.

Both the *Ordway* and *Ford* decisions argue that reasonable implied assumption of risk is needed to protect defendants who either provide recreational facilities or employ experts to address known risks. In the cases of certain professional injuries, such as the veterinarian assistant bitten by a

⁹⁰ *Ordway*, 198 Cal. App. 3d at 105, 243 Cal. Rptr. at 539.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 227 Cal. App. 3d 1175, 266 Cal. Rptr. 870 (1990), *reh'g granted*, 791 P.2d 290, 269 Cal. Rptr. 720 (1990).

⁹⁴ *Id.* at 1619, 266 Cal. Rptr. at 878.

⁹⁵ *Id.* at 1620, 266 Cal. Rptr. at 879.

normally behaving dog⁹⁶ or the air-conditioner repair expert falling from a dangerous ladder,⁹⁷ the workers have already been compensated in advance for the risk. The firefighters' immunity,⁹⁸ a rule that precludes firefighters from recovering for foreseeable injuries from those who negligently start fires, reflects this principle. In these instances it appears unfair to impose liability on defendants who have engaged experts to address known risks. *Ordway* emphasized this point by focusing on the reasonable "expectation of the defendant" to ignore reasonably assumed risks.⁹⁹

Yet, by focusing on the defendant's reasonable expectation, the *Ordway* court looks beyond traditional notions of implied assumption of risk, which focus on the subjective behavior of the plaintiff. In essence, the court appears to use a limited duty concept to limit the application of implied assumption of risk. *Ordway* emphasizes that professional athletes should be able to recover only when they can prove intentional or reckless wrongdoing by the defendant. Policy reasons are noted for not imposing negligent liability on defendants, at least in this athletic context, because the risk of such behavior is inherent in the activity. But *Ordway*'s introduction of limited duty concepts into the assumption of risk framework is not explicit and invites confusion. While focusing on the reasonable expectations of the defendant, *Ordway* also requires a specific inquiry into whether the plaintiff subjectively appreciated the inherent risk in the sport. It leaves ambiguous the degree to which both the defendant's expectations and the plaintiff's subjective awareness of the risk are critical to recovery.

Nonetheless, *Ordway*'s emphasis on the reasonable expectation of the defendant is informative and suggests that limited duty concepts are being used to limit recovery to cases involving intentional and reckless wrongs where courts have previously looked only to the plaintiff's subjective behavior. It is also noteworthy that other California decisions using

⁹⁶ See *Nelson v. Hall*, 165 Cal. App. 3d 709, 211 Cal. Rptr. 668 (1985). The court in *Nelson* affirmed a summary judgment in favor of the defendant owners of a dog who bit a veterinary assistant during treatment. Since "a veterinary assistant cannot be deemed to have unreasonably encountered a risk that is inherent in his or her job," the court classified this as reasonable implied assumption of risk, *i.e.*, a complete bar.

⁹⁷ See *King v. Magnolia Home Owners Ass'n*, 205 Cal. App. 3d 1312, 253 Cal. Rptr. 140 (1988). Plaintiff, an air-conditioning repairman, fell while descending a defective ladder after repairing an air conditioner. Because the defect was obvious to the plaintiff, the court found he had reasonably assumed the risk and was barred from recovery. *Id.* at 1317, 253 Cal. Rptr. at 143.

⁹⁸ See *supra* note 18.

⁹⁹ *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 105, 243 Cal. Rptr. 536, 539-40 (1988).

reasonable implied assumption of risk to bar recovery are clustered in particular factual contexts, namely athletics and professional risk.¹⁰⁰ Taken together, *Ordway* and these other decisions suggest that limited duty concepts can be, and are already being, used to avoid the semantic and theoretical difficulties in applying the doctrine of implied reasonable assumption of risk.

V. SHOULD ASSUMPTION OF RISK SURVIVE?

Should assumption of risk be a complete defense in all cases? Should implied reasonable assumption of risk be a complete defense or should it be abolished as a defense? While much theoretical disagreement persists, there appears to be more consensus on the desired results of specific factual patterns despite theories that pull in different directions. Recognizing that commonality of factual conclusions does not necessarily indicate what the law should be, it does display certain normative consensus in special cases.

Most starkly, Florida, as discussed above, abolished implied reasonable assumption of risk only to reincarnate much of it as express assumption of risk. In the context of contact sports and other athletic activities, the Florida courts have characterized what other jurisdictions would call reasonable implied assumption of risk as “express” and thereby have precluded liability even where the defendant is negligent and the plaintiff is reasonable.¹⁰¹ In short, Florida’s actual judicial treatment of implied assumption of risk differs dramatically from the direction and logic of its supreme court decision abolishing implied assumption of risk.

In a similar vein, Rhode Island’s treatment of assumption of risk is not as dramatically different from most states as a simple read of its stated doctrine would indicate. While the Rhode Island Supreme Court holds that implied as well as express assumption of risk is always a complete defense,¹⁰² this again is an oversimplification of the appellate courts’ approach. Since assumption of risk requires “knowledge” of a specific risk and “voluntary” exposure to that risk, the rigidity with which the court applies these elements can dramatically limit the application of the defense. While the published reported appellate record is not extensive, it is clear that Rhode Island’s finding of “knowledge” or “voluntariness” might better be predicted in some cases by determining whether implied assumption of risk is reasonable or unreasonable.

¹⁰⁰ See *supra* notes 85–97 and accompanying text.

¹⁰¹ See *supra* note 70 and accompanying text.

¹⁰² See *supra* note 25 and accompanying text.

In short, Rhode Island approaches Florida's position in practice. Reasonable implied assumption of risk is held not to be assumption of risk and consequently in such cases is not a defense. Florida, on the other hand, while purportedly abolishing reasonable implied assumption of risk, has in some cases characterized implied behavior as "express" assumption of risk and enforced it as a complete defense.¹⁰³

A majority of California appellate decisions hold that reasonable implied assumption of risk is a complete defense, while absorbing unreasonable implied assumption of risk into comparative negligence as a partial defense. In theory, the current California approach is the opposite of Florida's abolition of reasonable implied assumption of risk. Yet, once again, the disparity in jurisdictional approaches is not as great as the theoretical holdings would suggest. The California cases holding reasonable implied assumption of risk to be a complete defense concern either athletic participants, accepting risks arguably inherent in the sport, or professionals facing known risks in their trade. Florida, which rejects reasonable implied assumption of risk, would, at least in the athletic cases, reach a similar result by labeling the plaintiff's participation as "express" assumption of risk. Rhode Island, which ostensibly allows all forms of assumption of risk to be a defense, has not flinched from applying it against a voluntary athletic observer. Other jurisdictions use analogous theoretical adjustments to achieve remarkably similar results when confronted with the same kinds of cases.

This Article is not attempting to argue that all jurisdictions achieve the same results in every case. Nevertheless, in light of the extreme disparity in theory, it is informative that the appellate courts regularly adjust or manipulate theory to achieve similar results. This suggests the possibility that there are normative principles governing the appellate courts that are not articulated in current alternative doctrines.

By examining these shared results in jurisdictions adhering to different doctrines, I would argue for the construction of a more useful and forthright legal doctrine. In certain classes of activities, the courts do not want to impose liability for risks inherent or frequently associated with those activities. Such activities should be directly characterized as limitations on the defendant's duty. Limitations on duty exist throughout tort law where courts, for policy reasons, refuse to impose liability for mere negligence.¹⁰⁴ Liability for omissions, mental distress independent of physical injury, wrongful life and birth, and injuries suffered by trespassers and licensees are

¹⁰³ See *supra* note 70 and accompanying text.

¹⁰⁴ See W. KEETON & D. DOBBS, *supra* note 1, at 359 ("Certain types of interests, because of the difficulties they present, have been afforded relatively little protection . . . against negligent invasions.").

among common examples where many states limit the plaintiff's right to recover for negligence. The Florida courts utilize "express" assumption of risk, despite the lack of an express consent, to immunize defendants in athletic contexts. Similarly, California courts use "reasonable implied" assumption of risk to immunize liability in analogous cases. Yet both the Florida and California courts defend assumption of risk in these contexts, by analyzing why the defendant should not expect or be burdened with specific kinds of liability in these types of cases. Limiting the defendant's duty where the court determines there should be an enclave from liability accomplishes this purpose more directly. In addition, it avoids the risk that the defendant will be held liable in a factual context where the courts want to protect the defendant even when the plaintiff fails to appreciate a risk as required by assumption of risk.

It is beyond the scope of this Article to define exactly when limited duties should exist. A variety of policy concerns, however, might persuade courts that simple negligence should not be a basis of liability in particular standardized factual patterns. Courts are, for example, concerned with overburdening the insured community by compensating all negligently inflicted pure economic or mental injuries. In the context of sports, there is concern with interjecting excessive litigation into an already contentious arena without requiring a higher standard of culpability.

In the context of particular occupations, courts may conclude that potential plaintiffs have, as a class, bargained to assume particular risks which are reflected in their negotiated compensation. The well-established firefighters' immunity, for example, bars firefighters from recovering for injuries suffered while fighting fires caused by the negligence of potential defendants. Police officers sometimes face similar bars against recovery for injuries.¹⁰⁵ The willingness of some jurisdictions to find reasonable assumption of risk and thereby bar recovery by professionals facing hazards endemic to their trade is a natural extrapolation from the firefighter's immunity. As with firefighters, the plaintiffs have arguably already been compensated for foreseeable risks.

Indeed, a very recent Florida lower appellate decision specifically articulates a limited duty extrapolated from the firefighters' immunity principle that "a person specifically hired to encounter and combat particular

¹⁰⁵ See *supra* note 18.

dangers is owed no independent tort duty by those who have created the danger.”¹⁰⁶

Furthermore, public policy may not want to penalize or discourage the negligent from seeking professional assistance. It therefore may be appropriate in specific professional contexts to limit the obligation of potential defendants seeking such assistance. In short, courts can usefully adopt specific limitations on duties to effectuate judicial policies. Such policies are more efficiently and directly effectuated through limitations on duties rather than case-by-case determination of the idiosyncratic subjective perceptions of individual plaintiffs. This is especially true since a variety of policy factors beyond a presumed assumption of risk may be prompting the courts to protect defendants from liability for ordinary negligence in special factual contexts.

Assumption of risk is not an appropriate substitute for limiting the defendant's duty in such cases. For example, a good deal of the confusion was generated by Florida's unprecedented expansion of express assumption of risk after the abolition of reasonable implied assumption of risk. The confusion may be explained by the Florida courts' failure to create new limitations on duties in specific factual contexts such as athletics. Similarly, California appellate decisions barring any recovery for reasonable implied assumption of risk are advanced in either an athletic or high hazard professional context. The clustering of holdings in limited factual contexts

¹⁰⁶ *Anicet v. Gant*, 580 So. 2d 273 (Fla. 1991). The court also relied on the doctrine that “a landowner is not liable for negligently creating a condition to a contractor or other expert who was specifically hired to repair it.” *See also* 41 AM. JUR. INDEPENDENT CONTRACTORS § 28 (1968). *See supra* note 73.

The Rhode Island Supreme Court, which, unlike Florida, recognizes reasonable implied assumption of risk as a complete defense, also utilizes the limited duty methodology to justify the firefighters' immunity. In *Mignone v. Fieldcrest Mills*, 556 A.2d 35 (R.I. 1989), the court upheld the firefighters' immunity precluding recovery by a firefighter for injuries she sustained in the performance of her duties. The Rhode Island Supreme Court justified the rule as an example of “primary” assumption of risk, which the court described as “not an affirmative defense but instead . . . a rule of law dictating that the homeowner did not owe the firefighter a duty of not negligently causing a fire.” The court continued, “pursuant to the doctrine of primary assumption of risk, firefighters, as a matter of law, assume all normal risks inherent in their duties when they accept their positions as firefighters.” *Id.* at 38–39. The court concluded the public had already compensated the firefighters for taking the risk. While the firefighter's behavior was presumably reasonable, the court treats the immunity as a “limited duty.” While Rhode Island recognizes all assumption of risk as a complete defense, a limited duty has the advantage of precluding the plaintiff from arguing that he or she was not subjectively aware of the risk. *See generally supra* note 20 and accompanying text.

should, by itself, be a warning against extrapolating theoretical rationales beyond those facts.

When assumption of risk is no longer needed to provide immunity to defendants in special factual contexts but is instead replaced by specific limitations on duty, the role of assumption of risk as a defense is more limited. Express assumption of risk should be a complete defense when it constitutes a valid contract, either oral or written. If it is not a valid contract, then assumption of risk should be treated like comparative negligence.¹⁰⁷ Consequently, noncontractual assumption of risk, whether reasonable or unreasonable, should be absorbed into comparative fault and be a partial defense.

Assumption of risk is an appropriate defense because the plaintiff has subjectively consented to the risk. Why allow express assumption to be a complete defense when it is contractual and only a partial defense in other contexts? Traditional contract doctrine provides the rationale. Contract rules, formalities and limited exceptions to those formalities are constructed to validate that, in fact, a contract exists.¹⁰⁸ Determining actual intent when express statements are made is difficult by itself. Contract law provides appropriate safeguards to regulate when those express statements sufficiently reflect an agreement that should be enforced by law. To automatically impose an agreement "implicit" from conduct is to ignore the lessons and precautions of contract law.

The law of contracts is confined to promises "that the law will enforce."¹⁰⁹ Since promises relate to future behavior, contract law is similarly restricted to sanctioning breaches of future commitments.

¹⁰⁷ The idea of reducing damages where the plaintiff has *reasonably* assumed the risk is not entirely novel. See Note, *supra* note 8, at 378-79. Oregon and Utah have enacted statutes that could be interpreted to call for an apportionment of damages where the plaintiff reasonably assumed the risk. UTAH CODE ANN., § 78-27-38 (1987). Although cases in Oregon and Utah have not reached this conclusion, one commentator has suggested that this would be the best construction of the statutes. "While this conduct may not fit within classic 'unreasonableness,' in some cases it is significant because a plaintiff who truly knew the risk and truly voluntarily encountered it did in fact help in bringing about the very injury that befell him." V. SCHWARTZ, *supra* note 13, at 169-70.

¹⁰⁸ The formalities of contract law serve two functions: the evidentiary function and the cautionary function. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941). The most apparent function of formalities is to provide evidence of a contract's existence. *Id.* Formalities also warn the parties to the contract of the legal significance of their actions. *Id.* Both these functions help to ensure that a contract does in fact exist. See also E.A. FARNSWORTH, *CONTRACTS* 49 (1982).

¹⁰⁹ E.A. FARNSWORTH, *supra* note 108, at 3. See also, A.L. CORBIN, *CORBIN ON CONTRACTS* 160-245 (1952).

Furthermore, contract law is primarily concerned with promises extended in the context of a bargained exchange. In the absence of special contexts, such as detrimental reliance, the law will not enforce a bare promise that lacks sufficient consideration. Consequently, the requirement of consideration excludes unbargained promises from contract enforcement.

Implied assumption of risk requires neither promises, bargains, nor consideration. Implied assumption of risk is simply the plaintiff's voluntary and knowing encounter with a risk as manifested by his or her behavior. It is, of course, possible that certain behavior may manifest a bargained exchange, but this is only one of many possibilities. Implied assumption of risk may simply be gratuitous. Consequently, implied assumption of risk cannot be justified on contract grounds as a bargained for exchange of risks. If implied assumption of risk were always contracted for, courts could invoke, as a justification for enforcement, freedom of contract and, more generally, freedom to bargain for the allocation of risks.

Viewed in the context of contracts, the automatic enforcement of implied assumption of risk seems almost crude. On what basis should knowing, voluntary assumption of risk exculpate a negligent defendant? If the promise to assume the risk is based on a bargained for transaction, free from unlawful coercion, the process is generally recognized as involving "value-enhancing exchanges."¹¹⁰ In the free market place, a potential plaintiff may exchange a potential tort claim for an appropriate value. So long as there is some valuable consideration, the courts generally will not attempt to second-guess the market. A professional may, for example, be compensated in advance for the risk of encountering negligently created hazards. A legal doctrine that discourages reasoned and bargained for exchanges disrupts a market attempting to efficiently control those risks. There is little value in discouraging the employment of professionals to contain and limit the dangers from prior negligence. Similarly, the right to attend or participate in an athletic event can involve a bargained for reduction in the standard of care expected by participants.¹¹¹ In theory, the reduction in protection is exchanged for a reduced cost of participation.

While "bargained for exchanges" represent the classic rationale for enforcing contracts, modern contract theorists recognize that contract law also acknowledges reliance and unjust enrichment as additional bases for

¹¹⁰ See Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741 (1982); Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

¹¹¹ Even without a valid contractual reduction in duty, tort law may require, in some instances, automatic limitations on duty based on public policy. See *supra* notes 104-06 and accompanying text.

enforcing promises.¹¹² If an express assumption of risk constitutes a valid contract, it should be enforced as a contract. Similarly, to the extent contract law limits enforcements of, for example, an unconscionable or adhesion contract, such limits should also apply to express assumption of risk. Contract principles recognize that there are instances where a bargained for exchange may be unbalanced by gross disparity in bargaining power or other factors. In such instances, a contract to assume risk should be invalidated.

Should noncontractual assumption of risk be enforced? The rationale for such enforcement cannot rest on the precise rationale that justifies contracts, of course, since contract law would not enforce such exchanges. Arguably, however, noncontractual express assumption of risk and implied assumption of risk may, by analogy, be justified by some of the same principles that inform contract theory. For example, an implied assumption of risk may be viewed as an implied contract representing an implicit bargained-for agreement. In this manner, use of a chattel may be granted with the implicit understanding that known defects in the chattel should not result in liability to the owner. It is important, however, to distinguish between an implied contract and a fictional bargain. The statute of frauds in many instances does not prohibit unwritten implied contracts. There must be an actual agreement, however, and the requisite consideration, detrimental reliance, or unjust enrichment. In short, some transactions will constitute contractual assumption of risk in the absence of written agreements.

Should the principle, however, be extended in the absence of an actual agreement? Contract principles rely on individual negotiations in the marketplace and enforce actual promises. It is obviously inappropriate to make up an agreement that did not exist in fact and to justify enforcement because there was an "agreement." It also seems dangerous to manipulate contract law by enforcing a perceived implied contract when basic contract law would be unwilling to enforce the implied agreement for lack of compliance with the statute of frauds, or some other contract doctrine. For example, the requirement imposed by the statute of frauds that contracts must be written in specified instances reflects a careful evaluation of the risks of fraudulent assertions of contract terms in those kinds of transactions.

There are, of course, other rationales for enforcing noncontractual assumption of risk aside from contract principles. One can look to libertarian principles to justify total enforcement of noncontractual assumption of risk.¹¹³ Since assumption of risk is, by definition, voluntary and knowing, an individual's consent to risk arguably should preclude him or her from

¹¹² *Id.*

¹¹³ See Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

suing for detrimental consequences resulting from the risk. Under libertarian analysis, an individual has the moral right to make voluntary agreements and exchanges provided the rights of third parties are not injured. In assumption of risk, regardless of whether there is a valid contract, has not an individual surrendered his or her right to sue for risks he or she consents to? The question is problematic because a nonexplicit agreement makes it unclear that an individual who intentionally encounters a known risk is also agreeing he or she will not sue. The behavior of encountering a risk could also be interpreted to mean, "I am taking a chance and if I lose I still hope to recover from you." Consequently, the question then becomes whether it is proper to allow recovery when a plaintiff voluntarily assumes a known risk.

The answer this Article suggests is neither yes nor no. Noncontractual assumption of risk should be treated like comparative negligence. The jury should be instructed to appraise the degree to which voluntary exposure to negligence should reduce a negligent defendant's liability. Under comparative negligence, the plaintiff's behavior is compared with the defendant's and the plaintiff is barred from recovering a portion of his or her damages that is commensurate with his or her share of the fault. Comparative negligence avoids the anomaly of a complete bar on a plaintiff's recovery when the plaintiff's negligence may be only slight. The apportionment of fault arguably is fairer, since it reflects that neither the defendant nor the plaintiff may be totally responsible for the accident. While more complex to administer in some ways, comparative negligence avoids the danger of a jury rebelling from choosing between extremes. Comparative negligence contributes to accident avoidance by encouraging both parties to avoid injuries despite the possible presence of contributory negligence.

Noncontractual assumption of risk is in some ways more complex than contributory negligence. Contributory negligence measures variations from an objective reasonable norm of behavior. Assumption of risk measures voluntariness of exposure to and knowledge of a risk. As the Rhode Island cases illustrate, the concepts of voluntariness and knowledge are amorphous. Nothing is truly voluntary in a complex society, and drawing distinctions between physical, economic or other situational coercive factors can become very difficult. Individuals are faced with alternatives of varying appeals. While even a valid contract is in some sense an involuntary response to market and economic conditions, it is generally bargained for and agreed to in a way that day by day exposure to life's hazards is not. There are reasons for enforcing a contractual bargain, but to characterize voluntary exposures to all hazards as agreements not to sue seems overreaching.

In a similar vein, knowledge also varies from the precise to the general. Some noncontractual assumption of risk may approach reasoned and bargained for contracts and may justify a near total bar against technical

negligence. In other instances, the assumption of risk may be technically voluntary and yet compelled by intense economic or other coercive factors. The defendant's negligence, on the other hand, may be extreme and the plaintiff's culpability slight. Under a comparative system, a jury finding of assumption of risk may adjust the result to proportionally reflect such differences.

The popularity of comparative negligence is derived from an uneasiness with placing responsibility for unintended accidents on only one party, when responsibility is in fact shared.¹¹⁴ In implied assumption of risk, there is no clear expression of contractual intent. Instead, there are degrees of acceptance that may be deduced from the behavior of the plaintiff and the defendant. If the defendant is not at fault or is engaging in an activity or relationship that should be immune from liability for simple negligence, he or she should not be held accountable. Similarly, if a valid contract shifts responsibility to the plaintiff, courts should also completely protect the defendant. Otherwise, courts should compare the behavior of the defendant and plaintiff and make a fair allocation of the blame. A reasonable assumption of risk, like other factors such as relative causation, can affect the allocation of responsibility between the defendant and plaintiff. To draw extreme lines in complex fact patterns is to invite failure.

VI. CONCLUSION

If, as in this Article's opening hypothetical, an expert hired to repair an air conditioner falls from a poorly placed ladder, the court may choose to limit the duty of the defendant toward an expert hired to encounter a known risk, just as firefighters are limited by the firefighters' immunity from recovering for negligence. Similar limitations on duty may arguably be appropriate in other specific contexts, such as certain kinds of athletic participation.¹¹⁵ If the jurisdiction does not impose a limited duty based on normative and economic policy, the court should look for a contract that is valid under carefully evolved principles of contract law and that specifies whether one of the parties assumed the risk. In the absence of an applicable limited duty or a valid contract, the jury should allocate responsibility through a comparative evaluation of the defendant's and plaintiff's behavior. Then, and only then, should the certainty of contracts or articulated tort

¹¹⁴ See V. SCHWARTZ, *supra* note 13, at § 21.2.

¹¹⁵ This determination should carefully distinguish between risks that are an inherent part of an activity and therefore do not constitute negligence, and a decision to construct a limited duty to immunize defendants from liability for simple negligence.

policy of a limited duty yield to a more subtle and compromising analysis based on all the facts—something comparative fault is designed to do.